

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

THE UNITED STATES for the use of)
 GMW Fire Protection, Inc., an Alaska)
 Corporation,)
 Plaintiff,)
 vs.)
 KANAG'IQ CONSTRUCTION CO.,)
 INC., an Alaska Corporation, and)
 WESTERN SURETY COMPANY, a)
 South Dakota Corporation,)
 Defendants.) Case No. A05-170 CI (TMB)

**MEMORANDUM IN SUPPORT OF
MOTION TO ALTER OR AMEND A JUDGMENT**

A motion to alter or amend a judgment may be granted when the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. Howard v. Gutierrez, 503 F.Supp.2d 392, 394 (D.D.C. 2007). Defendants move this Court to reconsider its Memorandum Decision and Order [Re: Motion at Docket No. 131] dated June 28, 2008, based on the need to correct a clear error and prevent manifest injustice. In its decision, the Court misdescribes the proceedings at trial and Defendants' respective positions in their underlying Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial. In doing so, the Court misconstrues the applicable law and arrives at a conclusion that is logically inconsistent and thus mistaken. Defendants respectfully

1 request the Court to reconsider its Memorandum Decision and Order [Re: Motion at
 2 Docket No. 131] and to amend the judgment accordingly.

3 **DISCUSSION**

4 **A. Western Surety.**

5 In its decision, the Court stated that Western claims the scope of its liability is
 6 limited to breach of contract, noting that both breach of contract and *quantum meruit*
 7 claims are permitted under the Miller Act. [Order, p. 2, citing U.S. ex rel. Leno v. Summit
 8 Constr. Co., 892 F.2d 788, 791 (9th Cir. 1989)] The Court misunderstands Western's
 9 position on the issue of its liability. The quantum meruit claim in Leno was with respect to
 10 extra work done on the project, as opposed to work performed under the subcontract. Id.
 11 at 789. GMW's claims are solely for work performed under the subcontract. [Exhibit A]
 12 Western did not and does not dispute that, as a general matter as to Kanag'Iq, both breach
 13 of contract and *quantum meruit* claims are permitted under the Miller Act. Rather,
 14 Western disputes the scope of its liability in this particular case under either theory.

17 Assuming, *arguendo*, that the Court is correct that the term "bonded subcontract" as
 18 used in Taylor Constr. Inc. v. ABT Service Corp. Inc., 163 F.3d 1119, 1122 (9th Cir. 1998)
 19 is a shorthand reference to work done in furtherance under a subcontract with the prime
 20 contractor, Western maintains that GMW's right to recover against Western for that work
 21 is limited in this case by the terms of the payment bond on the main contract and the terms
 22 of the subcontract. Regarding modification, the Court is mistaken when it states that
 23 Western argues "without explanation" that the modification of the subcontract also modified
 24

1 the prime contract. [See Decision, p. 4; Reply, p. 5, ¶ 1] To the contrary, Western cited
 2 the trial testimony of Steve Frere and Phil Young that established the main contract
 3 operated as a unit-price contract the first two years, but did *not* operate as a unit-price
 4 contract in the third year -- irrespective of the subcontract. [Reply, p. 5; see Trial
 5 Testimony of Steve Frere and Phil Young, January 23, 2008] Western's obligation in this
 6 matter only arises from the payment bond on the main contract and the terms of the bond
 7 to which it agreed. [Exhibit C at Docket No. 23] Western did not bind itself with respect
 8 to a main contract that was modified such that it did not operate according to its terms as a
 9 unit-price contract in the third year.

11 In its decision, the Court concluded that the main contract was not modified in the
 12 third year and the subcontract was modified by "extension the subcontract [which, by
 13 definition, includes its terms] for an additional year." [Order p. 5] First, the original term
 14 of the subcontract was one year. [Exhibit B at Docket No. 23] Based on the jury's
 15 findings, the subcontract was not extended by option with the main contract in the second
 16 and third years of the project. This dispute concerns only the third year. Based on the
 17 jury's findings, the conclusion that the modification of the subcontract was only an
 18 extension of the subcontract for an additional year is, on its face, incorrect. If the Court is
 19 suggesting the subcontract was extended the second year and was non-existent the third
 20 year, then GMW would not be able to bring its claims "under the contract" as stated in the
 21 complaint. [Exhibit A]

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1 Second, with regard to the “extended” subcontract (which, by definition, includes
 2 its payment terms), GMW’s right to recovery against the surety, absent modification of the
 3 main contract, would thus be limited by the terms of the subcontract. As the Court noted
 4 in its decision, the Taylor panel held:

5 . . . The [Miller] Act also provides that any person “who has furnished labor
 6 or material in the prosecution of the work provided for in such contract . . .
 7 and who has not been *paid in full* therefore . . . shall have the right to sue on
 such payment bond . . . for the *sum or sums justly due him*.

8 Taylor, 163 F.3d at 1122 (emphasis added). The Court, however, failed to quote Taylor
 9 further regarding the meaning of “sums justly due” in this context. While it is true that
 10 Taylor sought recovery under the terms of the subcontract, and not under *quantum meruit*,
 11 that distinction doesn’t make a difference in this case absent extra work by GMW and
 12 absent modification of the terms of the subcontract. In its decision, the Court expressly
 13 stated: “the modification in this case was essentially the extension of the [sub]contract for
 14 an additional year.” [Decision, p. 5] This conclusion ignores one of the central issues
 15 contested at trial, as well as the jury’s findings. It also demonstrates that GMW’s right to
 16 recovery against the surety, absent modification of the main contract, would be limited to
 17 sums justly due for work provided for and compensable under the subcontract -- only
 18 modified by extension, according to the Court. The panel in Taylor explained, “‘sums
 19 justly due’ means the sums due the party under the bonded contract.” Id.

20 Both the main contract and the subcontract were written as unit-price contracts and
 21 operated as unit-price contracts in the first two years. [Exhibits A-B at Docket No. 23;
 22 Trial Testimony of Steve Frere and Phil Young, January 23, 2008] The Court posits that
 23

1 “[t]he modification in this case was essentially the extension of the subcontract for an
 2 additional year.” [Order, p. 5] Compensation based on any method other than unit prices
 3 was not part of the compensation for the work to be done under the subcontract.

4 With regard to compensation under the subcontract in the third year, GMW did not
 5 bill according to unit prices and GMW did not calculate its alleged damages according to
 6 unit prices. Western did not agree to that modification and there is no evidence that it did.
 7 Thus, the Court identified the modification as an extension of the unit-price subcontract for
 8 an additional year, yet it simultaneously allowed damages to be calculated and awarded on
 9 a non unit-price basis that exceeds both the scope of the subcontract and the scope of the
 10 payment bond on the main contract. That position is logically inconsistent and thus
 11 untenable.

12 Western’s liability under the payment bond should not be increased for
 13 modifications it did not approve. The extent to which Western’s liability is inappropriately
 14 being increased is reflected in what occurred at trial: Kanag’Iq introduced evidence of
 15 what it believed it was owed by GMW under a unit-price contract in the final year, while
 16 GMW introduced evidence not of what it believed it was owed under a unit-price contract
 17 extended for an additional year, but instead introduced evidence of what it believed it was
 18 owed based on each delivery order as its own lump-sum contract in the final year. [See also
 19 Testimony of Glenn Johnson: January 23, 2008] That constituted a modification to
 20 the terms of the subcontract, not merely an extension of the subcontract. To the extent the
 21 Court concluded that the modification only extended the term of the subcontract an
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 24 25

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1 additional year, the parties continued to be bound by the terms of the subcontract. It is
 2 prejudicial to Western to hold it liable beyond the scope of its obligation on a unit-price
 3 basis under the payment bond in this matter. Western has no liability to GMW and
 4 respectfully requests the Court to modify the judgment accordingly.

5 **B. Kanag'Iq.**

6 In its discussion of liability on the part of Kanag'Iq, the Court expanded on its view
 7 of the modification and the attendant obligations of the parties to the subcontract:

8 The modification in this case was essentially the *extension* of the contract for
 9 an additional year. The consideration was the quid pro quo that GMW
 10 would continue to perform its obligations under the subcontract and, in
 11 exchange therefore, Kanag'Iq would pay GMW for the labor and materials
 12 provided in prosecuting the prime contract between Kanag'Iq and the United
 13 States. Nothing in Alaska law precludes the parties from continuing to
 14 perform under an otherwise expired contract. That the agreement to *extend* a
 15 contract beyond its expiration may be shown by the conduct of the parties is
 16 consistent with existing Alaska precedent.¹

17 [Decision, pp. 5-6 (emphasis added)] To the extent that the modification was simply to
 18 extend a contract an additional year, the parties remained bound by the terms of that
 19 contract. It is undisputed that the subcontract as written was a unit-price contract. The
 20 consideration was the *quid pro quo* that GMW would continue to perform its obligations
 21 under the subcontract and, in exchange therefore, Kanag'Iq would perform its obligation
 22 under the subcontract -- which was to pay GMW for the labor and materials on a unit-price
 23 basis. For the time period in dispute, however, GMW did not bill according to unit prices

24 ¹ The main contract was extended in writing in option year one and option year
 25 two, so it is presumed that the Court is referring solely to the subcontract when it discusses
 modification as extension of the contract.

1 and GMW did not calculate its alleged damages according to unit prices. The Court's
 2 logic here is again mistaken.

3 With regard to the Court's remarks about waiver and ratification, the Court is
 4 mistaken in its assertion that Kanag'Iq did not object to the introduction of any of the
 5 evidence that logically tended to establish waiver. [Decision, p. 6] On the first day of
 6 trial, to the best of the undersigned counsel's recollection, the undersigned made an
 7 objection on record, before taking evidence, regarding the fact that waiver and ratification
 8 had not been raised as affirmative defenses in GMW's answer to Kanag'Iq's counterclaims,
 9 and GMW should therefore be precluded from introducing evidence to establish those
 10 defenses. [Trial Record: January 22, 2008] Counsel stated there was no objection to the
 11 introduction of such evidence for some other purpose. The Court confirmed, on record, as
 12 counsel recalls, that GMW's answer to Kanag'Iq's counterclaims did not contain any
 13 affirmative defenses regarding waiver and ratification. [Trial Record: January 22, 2008]
 14 Thus, in addition to the pleadings, this issue was addressed on the first day of trial --
 15 contrary to the Court's assertion in its decision.

18 CONCLUSION

19 Western Surety is not liable beyond the scope of the payment bond and the terms
 20 therein, which expressly preclude Western's liability for unauthorized modifications to the
 21 contract. Western maintains that the main contract was modified in the third year, that
 22 Western did not authorize the modification and is therefore not liable. To the extent the
 23 Court concluded that there was no modification to the main contract and the modification
 24

1 to the subcontract was only to extend it for an additional year, the parties remained bound
 2 by the terms of the subcontract -- a unit-price contract. The Court, however, identified the
 3 modification as the extension of the unit-price subcontract, yet simultaneously allowed
 4 damages to be calculated and awarded on a non unit-price basis that exceeds the scope of
 5 the subcontract. That position is logically inconsistent and mistaken. Western and
 6 Kanag'Iq are not liable under the subcontract to GMW for alleged damages based on non-
 7 unit prices. Western and Kanag'Iq, individually, respectfully request the Court to modify
 8 the judgment accordingly.

10 DATED at Anchorage, Alaska this 7th day of July, 2008.

11 EIDE & GINGRAS, P.C.
 12 Attorneys for Defendants
 13 Kanag'Iq Construction Co., Inc. and
 14 Western Surety Company

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CERTIFICATE OF SERVICE

1 I am a legal secretary employed by the law
2 firm of Eide & Gingras, P.C. That on this
3 7th day of July, 2008, I served

4 [x] Electronically

5 a true and accurate copy of the foregoing
6 document upon the following counsel of record:

7 Sarah J. Tugman, Esq.
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10 EIDE & GINGRAS, P.C.

11 By /s/Donna Charter

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